

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

1. STATE OF OKLAHOMA, ex rel. )  
W.A. DREW EDMONDSON, in his capacity as )  
ATTORNEY GENERAL OF THE STATE OF )  
OKLAHOMA and OKLAHOMA SECRETARY )  
OF THE ENVIRONMENT C. MILES TOLBERT, )  
in his capacity as the TRUSTEE FOR )  
NATURAL RESOURCES FOR THE )  
STATE OF OKLAHOMA, )

Plaintiff, )

v. )

05-CV-0329 GKF-SAJ

1. TYSON FOODS, INC., )  
2. TYSON POULTRY, INC., )  
3. TYSON CHICKEN, INC., )  
4. COBB-VANTRESS, INC., )  
5. AVIAGEN, INC., )  
6. CAL-MAINE FOODS, INC., )  
7. CAL-MAINE FARMS, INC., )  
8. CARGILL, INC., )  
9. CARGILL TURKEY PRODUCTION, LLC, )  
10. GEORGE'S, INC., )  
11. GEORGE'S FARMS, INC., )  
12. PETERSON FARMS, INC., )  
13. SIMMONS FOODS, INC., and )  
14. WILLOW BROOK FOODS, INC., )

Defendants. )

**DEFENDANTS' MEMORANDUM IN SUPPORT OF CERTAIN PROPOSED PROVISIONS IN PROPOSED  
STIPULATED ORDER IMPLEMENTING PARTIES' AGREEMENT CONCERNING DISCOVERY OF  
ELECTRONICALLY STORED INFORMATION**

Pursuant to this Court's December 5, 2006 Order Implementing Rules for Discovery of Electronically Stored Information ("ESI") (Dkt. #996), the Parties submitted their Proposed Stipulated Order Implementing Parties' Agreement Concerning Discovery of Electronically Stored Information (Dkt. #1056) ("Stipulated Order"). Pursuant to Paragraph V of the Court's

December 5, 2005 Order, the Defendants submit the following memorandum arguing in support of certain proposed provisions.

## **I. INTRODUCTION**

This Memorandum addresses two provisions proposed by the Defendants:

1. Paragraph II(F) addressing the Parties' Initial Conference regarding ESI pursuant to Paragraph I(A) of the ESI Order for all State agencies, offices and divisions;
2. Paragraph II(D), addressing methods for segregating and identifying ESI subject to privilege and other protections.

## **II. THE STATE'S SUPPLEMENTAL ESI INITIAL CONFERENCES SHOULD ADDRESS ALL AGENCIES, OFFICES, AND DIVISIONS WHICH MAY HAVE POTENTIALLY DISCOVERABLE INFORMATION**

The State has identified seven agencies<sup>1</sup> and the Office of the Secretary of the Environment ("OSE") as locations where information potentially responsive to Defendants' discovery requests may be located. Defendants believe that information responsive to their discovery may also be found at other agencies, offices and divisions of the State, including, but not limited to the Oklahoma Corporation Commission, Oklahoma Department of Mines, Oklahoma Department of Health, the Governor's office and the Legislature. During Defendants' ESI conferences with the State, Defendants specifically requested the State provide information pertaining to ESI at these additional locations.

With respect to the agencies, we understand that the State is making inquiries of those agencies and will advise whether they will provide supplemental information pertaining to ESI at

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<sup>1</sup> Oklahoma Scenic Rivers Commission ("OSRC"); Oklahoma Department of Agriculture, Food & Forestry ("ODAFF"); Oklahoma Department of Environmental Quality ("ODEQ"); Oklahoma Water Resources Board ("OWRB"); Oklahoma Department of Recreation and Tourism ("Tourism"); Oklahoma Department of Wildlife Conservation ("ODWC"); and Oklahoma Conservation Commission ("OCC").

those agencies. As to the Governor's office, we understand that the State is considering the Defendants' request for information pertaining to responsive ESI and will respond accordingly.

With respect to the Legislature, however, the State's ESI liaison unequivocally stated that the State's attorneys would not be making inquiries of any custodian of records for the Oklahoma Legislature. In light of the representations of the State's attorneys to this Court and Defendants that they represent the entire State of Oklahoma, Defendants' ESI liaisons inquired whether the State's attorneys also represented the Legislature, which would forbid Defendants from contacting the Legislature directly. The State could not respond, but promised a response to Defendants in the near future.

Similarly, with respect to any other agencies, offices and divisions of the State of Oklahoma, the State's ESI liaison refers Defendants, without any general or specific citation, to the various statutes of the State of Oklahoma which reference agencies, departments, boards, commissions and subdivisions of the State government. For example, the State is on record objecting to the proposed deposition of Attorney General Edmondson;<sup>2</sup> yet, the Attorney General is among the bodies listed in the Oklahoma Statutes referenced by the State's ESI liaison. *See* OKLA. STAT. tit. 74, § 18 *et seq.* The Oklahoma Legislature also is among the public bodies listed in the Oklahoma Statutes. *See id.* § 450 *et seq.* As noted, however, the State has yet to decide whether the Legislature is part of the "State." Consequently, the State's vague, noncommittal response regarding these additional public bodies furthers the circular logic that the State is employing in discovery.

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<sup>2</sup> Curiously, as an aside, the State maintains that Defendants are free to depose Secretary of the Environment Miles Tolbert as a representative of the State, notwithstanding that Mr. Tolbert is listed as an attorney for the State on both the docket sheet and the State's signature block. In any event, consistent with the State's contention with regard to the Oklahoma Statutes, the office of the Secretary of the Environment is one of the bodies listed and authorized by the Oklahoma Statutes. *See* OKLA. STAT. tit. 27A, § 1-2-101; tit. 74, § 10.1 *et seq.*

Defendants intend for the proposed Stipulated Order to include all agencies, offices and divisions of the State of Oklahoma, including the Oklahoma Legislature. In Paragraph II(F), Defendants propose that the additional ESI Disclosures not be limited to State agencies and offices, but also include divisions of the State. Paragraph II(F) of the proposed Stipulated Order provides:

As described in Paragraph I(A) of the ESI Order, the State will conduct an initial conference with Defendants to address the issues set forth in Paragraph I(B)(1-23) of the ESI Order regarding additional State agencies <<<**Defendants' Proposed Language: , divisions,**>>> and offices not previously addressed no later than **April 1**. (Defendants' proposed language in red).

At this stage of discovery, while the Parties are supplementing Initial Disclosures and continuing initial conferences to discuss ESI, the State's proposed language improperly limits the State's discussions and disclosures relating to ESI.

### **III. PROCEDURES FOR ADDRESSING INFORMATION INADVERTENTLY DISCLOSED ARE APPROPRIATE IN THIS CASE**

During the Parties' ESI conferences, Defendants asked the State to consider a Non-Waiver of Privilege Agreement. Such agreements simply provide that privilege is not waived by an inadvertent disclosure. Non-Waiver of Privilege Agreements are becoming increasingly common in cases involving a tremendous amount of ESI and documents.

Given the potentially enormous volume of documents and ESI that may be discovered, a Non-Waiver of Privilege Agreement is appropriate in this case. Defendants' proposed language does not require the State to enter into such an agreement. It merely requires the State to consider such an agreement. The State has suggested that a Non-Waiver of Privilege Agreement is not necessary should the Court adopt their procedure for appointing a Third-Party Expert. Defendants disagree that a Third-Party Expert is necessary. Furthermore, there is no

indication that the State's proposed procedures will alleviate the need for a Non-Waiver of Privilege Agreement by somehow reducing the potential volume of responsive ESI.

Respectfully submitted,

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### **CERTIFICATE OF SERVICE**

I certify that on the 22<sup>nd</sup> day of February, 2007, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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I also hereby certify that I served the attached documents by United States Postal Service, proper postage paid, on the following who are not registered participants of the ECF System:

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